

**Northwest Engineering Company and Local 7389,  
United Steelworkers of America, AFL-CIO.  
Case 30-CA-6002**

October 22, 1982

**DECISION AND ORDER**

On September 28, 1981, Administrative Law Judge Richard A. Scully issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Contrary to the Administrative Law Judge, we cannot agree that Respondent violated Section 8(a)(1) of the Act by denying the request of an employee to have a union representative present during a lunchroom meeting of a group of employees to review work rules. Since there is insufficient evidence to support a finding that the employees had reasonable cause to believe that the meeting would result in disciplinary action, we also cannot agree with the Administrative Law Judge's conclusion that the suspension of employee Michael Kennedy for insubordinate conduct during the course of that meeting was wrongful and requires a make-whole remedy.

The facts, as found by the Administrative Law Judge, indicate that on the day prior to the meeting at issue, Respondent's supervisors had questioned Kennedy and his coworker, Ronald Kriescher, about damage to a wall at the warehouse where both are employed as part of the outside crew. The two employees were also read the rules and regulations, so that both would be aware of the possible disciplinary consequences of causing such damage. A union representative attended that meeting, which was described by Respondent as "more or less an investigatory meeting."

On the following day, Respondent's supervisor, Kapla, observed what he considered to be an intentional work slowdown by the outside crew. Later that day, Kapla scheduled a meeting of the five inside and outside crewmembers, to be held in the employees' lunchroom. When asked by Kennedy what the meeting would be about, and if he could have a union steward there, Kapla told Kennedy that a steward would not be needed and to "just shut up and sit down." The meeting was attended by Foreman Kapla and his assistant foreman, Kemp, in addition to five employees.

Kapla passed out copies of the plant rules and regulations to those assembled and began reading through the rules and giving examples of what he considered to be violations. When Kapla got to the rule dealing with willful hampering of production, he referred to the slowdown he had observed that morning and identified Kennedy as being "guilty of this one." A heated discussion then ensued between Kennedy and Kapla, with Kennedy swearing and calling Kapla an "asshole." The next day Kennedy was suspended for 3 days and warned that his next offense would result in discharge because of his use of abusive language at the previous day's meeting. Kapla, Kemp, and Plant Manager Poss were all present in the meeting at which Kennedy was advised of his suspension, as was Kennedy's union steward, Miller.

On the basis of these facts, the Administrative Law Judge found, and our dissenting colleagues agree, that Respondent violated the rights of its employees as outlined by the Supreme Court in *N.L.R.B. v. J. Weingarten, Inc.*,<sup>1</sup> by requiring them to attend a meeting which they had reasonable cause to believe could result in disciplinary action after denying a request for union representation. It is not every employee meeting, however, to which *Weingarten* rights attach, and we are unable to agree that Respondent was obligated to comply with the request for a union representative's presence before it could read its plant rules and regulations and cite examples of rule infractions to an assemblage of its employees.

There is no evidence that the purpose of the meeting was investigatory. No questions were asked of anyone. Nor was any discipline meted out. The Administrative Law Judge, however, makes much of the fact that the meeting was called after Kapla observed what he considered to be a slowdown by the outside crew earlier in the day. That the meeting may have been prompted by such incident does not establish that the purpose of the meeting was investigatory or disciplinary. *Weingarten* rights do not arise simply because an employer calls a meeting of its employees to discuss a perceived problem in the way its employees are carrying out their duties. Work performance is a matter of legitimate concern to an employer. An employer surely retains the prerogative of calling a meeting of a group of employees, at which no disciplinary actions are contemplated or taken, simply to advise them of the employer's valid work performance expectations and to inform them of the possible con-

<sup>1</sup> 420 U.S. 251 (1975).

sequences of noncompliance, without invoking the spectre of *Weingarten*.<sup>2</sup>

It is true that, in the course of reading the rules to the employees, Kapla used Kennedy as an example of a rule violator, and that the offense for which he was cited occurred during the alleged slowdown. But these facts are insufficient to convert the meeting from a general shop meeting, informational in nature, to one involving the likelihood of discipline. There is no indication that Kennedy was to be punished for his alleged offending conduct, or that any other member of his crew would be disciplined for his actions. Indeed, the whole tenor of the meeting leads to the opposite conclusion: the entire shop was there; the purpose of the meeting clearly was stated to all at the outset; the rules were read in their entirety; several examples were given of other infractions, as well as Kennedy's; and the subject matter was of common interest and concern to all the employees, it did not relate to any one specific employee as to any single instance of purported misconduct or deficiency in performance. In short, it was a general shop meeting held by Respondent to express its concerns about the attitude of the employees toward their jobs.<sup>3</sup>

In these circumstances, the nature of the meeting, and its purpose, was not changed merely because the employees, including Kennedy, were put on notice that future violations of the rules could lead to discipline. That, after all, was made explicit by the reading of the rules. *Weingarten*, however, is not concerned with employees having reason to believe that discipline will be imposed for future offenses; it relates to past conduct for which employees fear the imposition of current sanctions.

Thus, even if the meeting had served as a forum for singling out Kennedy, that fact would not alter the character of the meeting which was held. Absent evidence that discipline would follow, Kennedy's being used as an example of an employee engaging in a rule infraction, while perhaps embarrassing to Kennedy and even unfair, is not enough to make *Weingarten* applicable. It is immaterial that

Respondent may have foreseen that Kennedy would attempt to defend himself, or that there would likely be some give and take between Kapla and the employees. The exchange of accusations and denials, or the interchange of viewpoints, claims, and counterclaims, does not determine whether a *Weingarten* right exists at such a meeting; what is determinative is whether discipline reasonably can be expected to follow. Here, the facts did not show that disciplinary action resulting from the meeting was a reasonable likelihood and, indeed, none was taken.<sup>4</sup> This last fact cannot be lightly dismissed in considering whether *Weingarten* applies in this case, for it belies a finding that the meeting was concerned with investigating the slowdown that allegedly had occurred that morning and with disciplining those involved. In this connection, at both the investigatory interview held the day before the meeting at issue and the disciplinary interview held the day following, Kennedy was fully accorded the benefits of union representation by Respondent—hardly the actions of an employer bent on contravening the rights of employees under *Weingarten*. We find, therefore, that Kennedy's insubordinate reaction to Kapla's assertion cannot reasonably be attributed to Respondent's failure to afford him the presence of a union representative or condoned as arising out of that failure.

Accordingly, we conclude that Respondent did not violate the Act either by requiring Kennedy and other employees to attend the above-described meeting without the presence of a union representative, or by taking disciplinary action against Kennedy as a result of his insubordinate conduct at that meeting. Therefore, we shall dismiss the complaint in its entirety.

<sup>4</sup> That Kennedy and Kriescher had been questioned the day before about a wholly unrelated matter—damage to company property—does not warrant a different conclusion. Contrary to the Administrative Law Judge, and the dissenters, we believe that it was significant that the meeting was for all employees, not just those two or their other crewmembers. In any event, whatever fears they may have harbored about potential disciplinary action should have been substantially allayed once it became apparent that the meeting was for the shop. Moreover, we deem Kapla's refusal to disclose the purpose of the meeting to Kennedy alone in response to his inquiry is of no consequence since at the outset of the meeting Kapla told all the assembled employees of its purpose. Nor does it matter that Kapla opened the meeting by alluding in general to the concerns which led Respondent to call it. Such remarks were introductory in nature, and nothing more is to be read into them. They fail to evidence a purpose of the meeting other than that indicated by Kapla and the meeting itself. In this regard, the dissent errs in focusing exclusively on Kennedy's and Kriescher's fears without taking into account the context of the meeting and its stated purpose. An employee's fear of discipline cannot by itself convert a meeting into a disciplinary or investigatory exercise. If the meeting is not intended to be and in fact is not concerned with discipline or an investigation into employee conduct, and the employee is made aware of this either before or at the meeting, the employee's fear to the contrary is immaterial. Such is the case presented here.

<sup>2</sup> In this regard, the Supreme Court recognized in the *Weingarten* case that an employee's exercise of the right to union representation may not interfere with legitimate employer prerogatives. *N.L.R.B. v. J. Weingarten, Inc.*, *supra* at 258.

<sup>3</sup> The dissent's assertion that the meeting was used "as a smokescreen to disguise what would otherwise be an investigatory or disciplinary interview" is without foundation. We fail to see, in the circumstances of this case, how Respondent's citing infractions of its rules and regulations in the course of reading and discussing them involves *Weingarten* rights absent evidence that discipline would follow. The dissent concedes that a reading and discussion of such rules and regulations does not give rise to *Weingarten*. In such a context, citing examples of rules breaches would seem to be warranted as part of the discussion. *Lennox Industries, Inc.*, 244 NLRB 607 (1979), relied on by the dissent, is factually distinguishable and therefore inapposite.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

MEMBERS JENKINS and HUNTER, dissenting:

Contrary to our colleagues, we agree with the Administrative Law Judge's finding that Respondent violated Section 8(a)(1) of the Act by: (1) denying the requests of employees Kennedy and Kriescher to have a union representative present during a meeting which those employees had reasonable cause to believe would result in disciplinary action; and (2) suspending employee Kennedy as a result of that meeting.

The facts concerning this matter are not complicated. As found by the Administrative Law Judge, a hole was found in a wall at Respondent's warehouse on April 28, 1980.<sup>5</sup> Assistant Foreman Kemp reported to Foreman Kapla that he (Kemp) had observed Kennedy and Kriescher in the vicinity of the hole immediately before it was discovered. Later that day, Kapla, suspecting that the damage was caused by Kennedy and Kriescher, called the two employees into his office for a meeting. Virtually all of Respondent's supervisory personnel were present at the meeting, as was Union Steward Miller. Head Foreman Dorak questioned Kennedy and Kriescher about the damage, but made no accusations of responsibility, and read aloud Respondent's rules and regulations. Dorak, who described the conference as "more or less an investigatory meeting," explained that he read the rules and regulations to the two employees "so they were aware of what could happen to them if disciplinary action was taken against them."

At or about 11:45 the following morning, Kapla observed what he considered to be an intentional work slowdown by the "outside crew," which consisted of Kennedy, Kriescher, and a third employee, and reported this to Dorak. At 3:10 that afternoon, Kennedy and Kriescher were instructed by Kapla to go to the lunch table in the warehouse for a meeting. Kennedy asked Kapla what the meeting was about and also asked if a union steward could be present. Kapla responded, "just shut up and sit down." Kriescher then asked if a union steward could be present, but Kapla failed to respond. Shortly thereafter, the rest of Respondent's employees arrived at the lunch table. Kapla then began the meeting by passing out copies of Respondent's rules and regulations, reading aloud through the rules, and giving specific examples of what he considered to be rule violations. When

Kapla reached rule 4(A), concerning willful hampering of production, he stated, "Kennedy, you're guilty of this one." Kennedy then asked what he had done, and Kapla replied that he had seen Kennedy hiding behind the crane. When Kennedy attempted to explain what he had been doing behind the crane, Kapla accused Kennedy of being a "liar," and said that he (Kapla) had seen Kennedy "hiding back there." This exchange between Kennedy and Kapla, described by Kennedy as being "very heated," continued for about 5 minutes. During the course of the exchange, Kennedy referred to Kapla as an "asshole." Another employee present at the meeting, Carlson, described the meeting as Kapla "more or less reading out Mike Kennedy for not doing his job properly."

On April 30, Kennedy was called to a meeting with Kapla, Kemp, and Plant Manager Poss. Union Steward Miller also attended this meeting. Poss explained that the meeting concerned Kennedy's use of abusive language to Kapla in the meeting the previous day. At the conclusion of the meeting, Poss said that he would investigate the abusive language matter further. The following day Kennedy was suspended for 3 days and warned that the next offense would result in discharge.

Based on the foregoing, the Administrative Law Judge found, and we agree, that Respondent unlawfully infringed on Kennedy's and Kriescher's *Weingarten* rights<sup>6</sup> by requiring them to attend an interview which they had reasonable cause to believe could result in disciplinary action after denying their requests for union representation. Our colleagues, however, find that there is insufficient evidence to support a finding that the employees had reasonable cause to believe the meeting would result in disciplinary action, and further find that there is no evidence that the meeting was investigatory or disciplinary in character.

Initially, we find it plain that Kennedy and Kriescher, based on an objective standard, had reasonable cause to fear that discipline might result from the April 29 meeting. Those two employees had been questioned only the day before concerning alleged damage to a wall of the warehouse and, while not directly accused of causing that damage, they were explicitly warned that discipline could result from violating company rules. The fact that, shortly after asking for their union representative, a request denied with a curt answer of "shut up and sit down," other employees joined Kennedy and Kriescher did not allay the reasonable nature of their fear of discipline. Indeed, on direct examination Kapla admitted that he opened the meeting by

<sup>5</sup> Unless otherwise noted, all dates are in 1980.

<sup>6</sup> *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

stating, "Ryan Dorak requested that we have this meeting because of the damage to the Company property and things that have been going on lately." The Administrative Law Judge found that this latter reference referred to the alleged slowdown of April 29 and an earlier instance of an alleged slowdown—in both of which Kennedy and Kriescher allegedly had participated. In these circumstances, we would find that Kennedy and Kriescher clearly had grounds for reasonable fear that discipline might result from the meeting at the time they requested the presence of their steward, and that Kapla's introductory remarks at the meeting were insufficient to allay those fears.<sup>7</sup>

With respect to the character of the April 29 meeting, we agree in general with the legal observations of our colleagues but do not agree that those observations are at all relevant in the instant case. An employer, of course, is free at any time to assemble its employees for the purpose of explaining disciplinary rules, work performance expectations, or almost any other matter whether or not it concerns the work relation, without having to meet the strictures of *Weingarten*. However, an employer may not use such a meeting as a smokescreen to disguise what would otherwise be an investigatory or disciplinary interview at which the protections of *Weingarten* are applicable in full. As we have recognized in an analogous situation,<sup>8</sup> where an employer begins what might be considered a meeting outside the parameters of *Weingarten*, but during the course of which is converted into a disciplinary or investigatory interview, *Weingarten* rights attach immediately. In this case, had the April 29 meeting been limited to a reading and discussion of Respondent's rules and regulations, no right to union representation would have attached. But that meeting was not so limited; rather, it was called not just to read the plant rules but also to

specify infractions of those rules. Moreover, Kapla directly accused Kennedy of having violated several of Respondent's rules. The Board previously has recognized that accusations of misconduct are sufficient to give rise to a right to representation under *Weingarten*, even when unaccompanied by threats of discipline. Thus, in *Lennox Industries, Inc.*, 244 NLRB 607, 608-609 (1979), the full Board<sup>9</sup> found a *Weingarten* violation where a supervisor ignored an employee's request for representation after the supervisor said that he had observed the employee and believed that he was causing a slowdown in production.<sup>10</sup> In cases where the Board has refused to find a *Weingarten* violation, it often has noted that, once a request for union representation was made, the respondent "made no attempt to question the employee, engage in any manner of dialogue, or participate in any other interchange which could be characterized as an interview."<sup>11</sup>

In the instant case, however, Respondent denied repeated requests for union representation, failed to give any assurances that disciplinary action would not result from the meeting, identified specific incidents which it considered violations of its plant rules, and then directly accused employee Kennedy of particular rule violations. Kennedy thus was required to defend his conduct; otherwise, his silence could have been construed as an admission of guilt. Directly relevant here is the Administrative Law Judge's explicit ruling discrediting the self-serving testimony of Kapla and Kemp that, had evidence of rule violations been obtained at the meeting, no disciplinary action would have been taken by Respondent. We again emphasize, as did the Administrative Law Judge, that no assurances were given against discipline based on facts obtained at the meeting.

In these circumstances, we would find, in agreement with the Administrative Law Judge, that the April 29 meeting in fact was an "interview," that Kennedy reasonably feared that discipline could result from the meeting, and, therefore, that, upon request, Kennedy was entitled to the presence of his union steward. As the evidence clearly shows that Kennedy made such a request, that Respondent denied the request but continued to hold the interview, and that Kennedy was disciplined as a

<sup>7</sup> At fn. 4 of its opinion, the majority illustrates the fallacies in its rationale by twice contradicting itself. Thus, the majority argues that the context in which the meeting was held—the day following an admittedly investigatory interview—is of little weight. The majority further argues that Kapla's introductory remarks, stating that the meeting was being held on account of "the damage to Company property and things that have been going on lately," are of no import. Immediately following these contentions, our colleagues accuse us of erring by ignoring these factors and exclusively focusing on employees' fears. However, it is apparent from the foregoing that it is the majority which ignores context and stated purpose—the very factors it argues should be considered. Additionally, the majority argues that if the meeting is not intended to be and in fact is not concerned with an investigation into employee conduct, and the employee is made aware of this either before or at the meeting, an employee's fear that discipline might result is immaterial. While this contention may be an accurate statement of the law, it has no relevance to the instant case. Here, the meeting was, in fact, an investigation into employees' conduct (witness the accusations directed at employee Kennedy and see *Lennox Industries*, discussed *infra*) and neither Kennedy nor Kriescher was given any assurances to the contrary despite directly having asked the purpose of the meeting.

<sup>8</sup> See *Baton Rouge Water Works Company*, 246 NLRB 995, 997 (1979).

<sup>9</sup> Then Chairman Fanning and Member Jenkins dissenting in part on other grounds.

<sup>10</sup> The majority finds that *Lennox Industries* is "factually distinguishable and therefore inapposite." However, we note that the majority declines to state the grounds on which they would distinguish that case. As noted above, in *Lennox* the full Board found that *Weingarten* rights attached when a supervisor accused an employee of causing a slowdown in production. These are the same facts as are present in the instant case.

<sup>11</sup> See, e.g., *General Electric Company*, 240 NLRB 479, 481 (1979); *Amoco Oil Company*, 238 NLRB 551, 552 (1978).

result of that meeting, we believe that the Administrative Law Judge properly concluded that Respondent violated Section 8(a)(1) of the Act as alleged in the complaint,<sup>12</sup> and would affirm his recommended Order.<sup>13</sup>

<sup>12</sup> It is irrelevant to our inquiry that no discipline resulted from the facts elicited at the meeting. The only proper inquiries in cases such as these are whether the meeting was an interview and, if so, whether the employee or employees requesting the presence of a union representative reasonably feared that discipline might result from the meeting.

<sup>13</sup> Member Jenkins would adopt the Administrative Law Judge's recommendation that Respondent be required to make whole Michael Kennedy and expunge any records of his unlawful suspension, but would do so for the reasons set forth in his partial dissent in *Kraft Foods, Inc.*, 251 NLRB 598, 599 (1980). Member Jenkins would not rely upon *Coyne Cylinder Company*, 251 NLRB 1503 (1980), cited by the Administrative Law Judge, in which he did not participate.

## DECISION

### STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge: This case was heard at Green Bay, Wisconsin, on July 23, 1981, pursuant to a complaint issued by the Regional Director, National Labor Relations Board, Region 30, on November 26, 1980, based upon a charge filed by Local 7389, United Steelworkers of America, AFL-CIO (the Union), on August 25, 1980. The complaint alleges that Northwest Engineering Company (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), by denying the requests of employees to have a union representative present during a meeting which the employees had reasonable cause to believe would result in disciplinary action and by suspending employee Michael Kennedy as a result of that meeting. The Respondent's timely answer denied that it had committed any violation of the Act.

Upon the entire record, my observation of the demeanor of the witnesses, and after consideration of the briefs filed by counsel, I make the following:

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent admits that it is engaged in the manufacture and sale of construction equipment at its facility in Green Bay, Wisconsin, and that during the calendar year preceding the filing of the complaint in the course of its business it sold and shipped from its Green Bay facility directly to points outside of the State of Wisconsin products, goods, and materials valued in excess of \$50,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Issues

The issues are (1) whether the Respondent violated rights of its employees protected by Section 7 of the Act as outlined by the Supreme Court in *N.L.R.B. v. J. Weingarten, Inc.*,<sup>1</sup> by requiring them to attend a meeting which they had reasonable cause to fear might result in disciplinary action after denying their request for union representation; and (2) whether employee Michael Kennedy, who was disciplined as a result of his conduct during such meeting, is entitled to any relief.

### B. Facts

The incidents involved here took place at the Respondent's Ashwaubenon warehouse and yard where there was an outside crew consisting of Michael Kennedy, checker; Terrance Dorn, crane operator; and Ronald Kriescher, crane groundman; and an inside crew consisting of Greg Carlson, checker; and Wayne Bero, forklift operator. Lester Kapla was the foreman at the Ashwaubenon facility and Larry Kemp, assistant foreman. Ryan Dorak was head foreman of the Ashwaubenon and Green Bay yards and Kapla's immediate superior.

On April 28, 1980,<sup>2</sup> a hole was found in a wall at the warehouse. Kemp had seen Kennedy and Kriescher in the vicinity immediately before the hole was discovered and, according to the testimony of Kapla, they were suspected of having caused the damage. Later that day, Kennedy and Kriescher were called into a meeting in Kapla's office with Kemp, Kapla, Dorak, and Plant Manager Jerry Poss. Also present was Ira Miller, the union steward for the warehouse employees. Kennedy and Kriescher were questioned about the damage by Dorak but no accusations were made nor any blame placed at the meeting. Dorak testified that he read "the rules and regulations to them so they were aware of what could happen to them if disciplinary action was taken against them." Neither employee was disciplined as a result of this meeting. In his testimony Dorak described this as "more or less an investigatory meeting" and a written report on the meeting he prepared lists as its subject "Conference on Plant Rules (Damaging Company Property)."

At or about 11:45 on the morning of April 29, Kapla observed what he considered to be an intentional work slowdown by the outside crew. He reported this to Dorak.

At 3:10 that afternoon, Kennedy and Kriescher entered the warehouse and were told by Kapla to put their gear away and to go to the lunch table as there was going to be a meeting. According to Kennedy's testimony, he asked Kapla what the meeting was about and if he could have a union steward at the meeting. Kapla's response was, "just shut up and sit down." Kriescher then asked Kapla if a steward could be present and there was no response. Kriescher's testimony concerning this conversation corroborates that of Kennedy.

<sup>1</sup> 420 U.S. 251 (1975).

<sup>2</sup> All dates are in 1980.

Kapla testified that Kennedy asked, "is Ira going to be there?" and he responded, "no, we don't need Ira for this meeting." Kapla knew that the Ira to whom Kennedy referred was his union steward. He did not tell Kennedy and Kriescher what the meeting was to be about and when they asked what it was about he told them "to sit down and be still."

Kemp testified that when Kapla spoke to Kennedy and Kriescher about the meeting they were 10 to 15 feet from his office, that the office door was open and the window may have been open. He heard Kapla tell them there was to be a meeting and that Kennedy asked if Ira Miller was going to be there and Kapla said he would not be needed.

The meeting was held in the lunchroom with the other members of the outside and inside crews and Kemp also present. No union steward was present. Kapla passed out copies of the plant rules and regulations and began reading through the rules, giving examples of what he considered to be violations.

Kapla's version of the meeting is as follows: when he got to Rule A(4) concerning willful hampering of production he mentioned the apparent slowdown by the crane crew he had seen that morning. He accused no one in particular but mentioned what each member of the crew was doing or not doing at the time. At that point Kennedy said "you're blaming me," and Kapla said "no." Kapla then mentioned another incident in which Kemp had seen the crane crew sitting down. Kennedy then accused Kapla of "keeping a book" on him which Kapla denied. Kennedy then called Kapla a "liar" and while standing up, leaning over the table, and pounding his fists on the table, continued to rage at Kapla, finally, calling him an "asshole." Kapla asked Kemp if he had heard that and was told he had. Kapla then continued reading through the rules and when he had finished asked if anyone had any questions. Everyone said "no." Kapla asked no other questions of anyone and at no time did he call Kennedy any names or single him out with respect to any rule violations. Kemp's version of the meeting is almost identical to that of Kapla except that he added that Kapla was not red in the face and did not show any emotion during the meeting.

Kennedy's description of the portion of the meeting dealing with Rule A(4) was quite different. Kapla came to that rule and stated: "Kennedy, you're guilty of this one." Kennedy asked what he had done and Kapla said he had seen him hiding behind the crane. When Kennedy explained what he had been doing, Kapla called him "a liar," and said he had seen him "hiding back there." This exchange continued for about 5 minutes. Kennedy admitted swearing several times and that he could have used the word "asshole." He described the exchange as very heated and stated that Kapla also swore several times.

Kriescher testified that when Kapla reached Rule A(4) he said to Kennedy, "Mike, this is the one you broke" and then went on to explain how he broke it although he could not remember the example Kapla gave. He could not recall if Kapla mentioned what the members of the crane crew were doing or if Kapla spoke about a work slowdown. He could not recall whether Kennedy was

sitting or standing during the exchange in which he used the word "asshole" and described the conversation as "getting a little warm" which meant "no screaming or throwing punches."

Greg Carlson also attended the meeting on April 29. He testified that Kapla read a list of rules, explained what the employees were supposed to be doing, and how the rules were to be followed. He described Kapla as "more or less reading out Mike Kennedy for not doing his job properly," although he could not recall the specific plant rule involved. Kapla accused Kennedy of "hiding behind a crane, trying to avoid work" and Kennedy denied it. He recalls hearing Kennedy swear but did not hear him say the word "asshole."

On April 30, Kennedy attended a meeting with Kapla, Kemp, and Poss, with Ira Miller present as his steward. The subject was his use of abusive language to a supervisor at the meeting the previous day. Poss conducted the meeting and gave Kennedy, Kapla, and Kemp the opportunity to speak. Poss then told Kennedy that Kapla was doing him a favor by warning him and that he, Poss, would have written Kennedy up right away for insubordination as a result of the slowdown. Poss said he would investigate the abusive language matter further. The following day Kennedy was suspended for 3 days and warned that the next offense would result in discharge.

#### B. Contentions of the Parties

It is the General Counsel's position that prior to the meeting on April 29, Kennedy and Kriescher made a request that a union steward be present at the meeting and even if the testimony of Kemp and Kapla that they asked only if the steward would be present is credited, the request was, nevertheless, effective to preserve the employees' right to representation at the meeting. It is also contended that the employees had reason to fear that the meeting could result in disciplinary action given the extraordinary nature of this meeting, 1 day after Kennedy and Kriescher were the subjects of a company inquiry concerning damage to its property, and the refusal of Supervisor Kapla to divulge the nature of the meeting. It is further contended that despite the alleged informational purpose of the meeting to familiarize employees with company rules, the meeting was not a "run-of-the-mill" shop-floor conversation but one which involved sufficient risk of discipline as to come within the *Weingarten* rule. Finally, it is contended that, although the disciplinary action taken against Kennedy was based upon an offense which was not the subject matter of the unlawful interview, that offense occurred in the context of the Respondent's 8(a)(1) violation and a make-whole remedy is necessary.

The Respondent, on the other hand, argues that not one of the essential elements of a *Weingarten* violation has been established. It contends that the meeting was not an investigatory interview in that nothing was being asked of the employees either by request for answers or specific actions. It follows that if the purpose of the meeting was not to obtain facts to support disciplinary action that is probable or being seriously considered, the employees cannot be said to have a reasonable fear that

discipline will result by any objective standard. Finally, the Respondent contends that the employees did not request union representation at the meeting, the only inquiry being whether the union steward was going to attend the meeting. This was not an effective request for representation, the denial of which would violate *Weingarten*.

### C. Analysis and Conclusions

It was essential that in order for *Weingarten* rights to attach to the April 29 meeting, the employees involved therein had to make a request for such representation. The testimony concerning the alleged requests of Kennedy and Kriescher is in conflict. Having observed the demeanor of the witnesses and considering other factors bearing on their credibility, I credit the testimony of Kennedy that he specifically asked Kapla if they could have a union steward present at the meeting and that Kriescher made a similar request over that of Kapla<sup>3</sup> and Kemp.<sup>4</sup> Kennedy testified that he had been told by union steward Ira Miller that if a surprise meeting were called to make sure Miller was there on their behalf. Miller, who was a credible and convincing witness, verified that he told Kennedy, who had been complaining to him about harassment on the job, to get a union representative anytime he had any doubt about whether a meeting called by management might result in discipline. Given this background and the fact that Kennedy had been the subject of an investigative interview the previous day with a steward in attendance, I find it unlikely that he would have simply asked if Miller was going to be present at the meeting and then have been content with Kapla's statement that Miller was not needed when, at the same time, Kapla refused to tell him what the meeting was about. Accordingly, I find that Kennedy made a request for a union representative prior to the April 29 meeting. Having made this request on the shop floor when he was summoned to the meeting, it was not necessary that he repeat it at the meeting.<sup>5</sup>

The right to representation afforded by *Weingarten* is not without exceptions. There is no right to representation at a meeting "held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision."<sup>6</sup> This exception clearly has no application here. Another exception, more in point, involves "run-of-the-mill shop-floor conversations as, for

example, the giving of instruction or training or needed corrections of work techniques" where there would normally be no basis to fear an adverse impact from such a meeting.<sup>7</sup> If this case involved only a routine reading of plant work rules to an assembly of department employees without more, this exception would dispose of the matter. There are several circumstances presented here, however, which lead to the conclusion that the meeting on April 29 was not routine and was not purely informational.

Although Kapla, Kemp, and Dorak all gave testimony denying that the meeting was a result of the work slowdown Kapla thought he saw on the morning of April 29, the evidence convinces me that it was. Kapla first testified as follows:

Q. (By Ms. Cherney) Now, the next day was April 29th. Were you working that day?

A. Yes, I was.

Q. Did you have an opportunity to observe the outside crew?

A. Yes, I did.

Q. You noticed that they were working slowly, right?

A. Yes.

Q. In fact, it almost looked like they were intentionally slowing down; is that right?

A. Yes, it did.

Q. And you told your supervisor, Ryan Dorak, about that?

A. Yes, I did.

Q. And he suggested a meeting?

A. Let's see now. Yes, Ryan suggested—Yes.

Q. Okay. And you had such a meeting that day, didn't you?

A. Yes.

Kapla also testified that he observed the slowdown at 11:45 a.m. Kemp testified that he first learned there was to be a meeting from Kapla at "midday around noon or something." The Company's written report concerning Kennedy's suspension states in pertinent part:

Tuesday, April 29 — The crane crew was working very sluggishly, almost like a work slowdown. Ryan suggested a department meeting to clear the air in which he went over the entire Plant rules and gave some examples. Kennedy is on the crane crew and we didn't want it to look like we were "picking on him" after Monday.

Although also adamantly denied by Kapla, Kemp, and Dorak, the evidence convinces me that the focus of the meeting was Kennedy and his involvement in the apparent slowdown by the crane crew. While he may have given some other examples of rules violations, Kapla specifically accused Kennedy of violating Rule A(4) concerning "willful hampering of production" and referred to the slowdown he had observed that morning.<sup>8</sup>

<sup>3</sup> Even allowing for a natural tendency to present one's actions in a favorable light, I found Kapla's testimony concerning what happened at the April 29 meeting to be incredible. According to him, he sat calmly and read the rules while Kennedy, without provocation, became increasingly angry and abusive reaching the point where he was standing and pounding on the table calling Kapla a "liar" and an "asshole" and accusing him of "fucking with my livelihood." In the face of all this, Kapla contends his only response was, "Michael, Michael, Michael, you are exaggerating." I found Kemp's testimony that Kapla showed no emotion during the meeting to be equally unbelievable. I also found Kapla's insistence that the slowdown he thought he observed on April 29 had nothing to do with the holding of the meeting that afternoon casts further doubt on his credibility.

<sup>4</sup> I am not convinced that Kemp was in a position to hear every word of this conversation when he was in another room 10 to 15 feet away and, in any event, I credit Kennedy for the reasons stated.

<sup>5</sup> *Lennox Industries, Inc.*, 244 NLRB 607 (1979).

<sup>6</sup> *Baton Rouge Water Works Company*, 246 NLRB 995 (1979).

<sup>7</sup> *Quality Manufacturing Company*, 195 NLRB 197, 199 (1972).

<sup>8</sup> This finding is based on the credited testimony of Kennedy, Kriescher, and Carlson. It is noted that Kriescher and Carlson are current.

The reference in the company report to the effect that they did not want it to look like they were "picking on" Kennedy implies that this was the reason other employees in the department were included in the meeting. Although Kapla and Dorak claimed the meeting was called because there had been several instances of damage to company property and "a lot of things happening out there," the only specific incidents disclosed by the record are the hole in the wall and two alleged work slowdowns, all three of which allegedly involved Kennedy.

It appears that the format of the April 29 meeting was similar in many respects to that involving the investigation of the hole in the wall on the previous day, which Dorak's memorandum described as a "conference on plant rules." Although Kapla asked no questions of anyone, his accusation that Kennedy was "guilty" of violating Rule A(4) was certainly as likely to evoke a response as a question about the matter, if not more so. Kennedy was accused of causing a work slowdown in front of the entire warehouse/yard work force, some of whom had, according to the Respondent's report on Kennedy's suspension, previously complained "to the foreman about his wasting time in the bathroom and not doing his fair share of the work." Under the circumstances Kennedy was forced to defend his conduct, as to have remained silent could well have been construed as an admission of guilt. The format of the meeting also appears designed to give other employees the opportunity to disassociate themselves from the actions of those being accused, thus, possibly further incriminating the latter.

Other factors leading me to believe the meeting was not intended solely as a one-sided reading of the company's work rules for informational purposes only are the statement in the Respondent's report, dated May 1, 1980, concerning the meeting in which Kennedy was given notice of his suspension, which states that the April 29 meeting was called to "clear up any confusion within the dept. regarding acceptable rules of behavior" and its report dated May 2, 1980, which states that Dorak "suggested a department meeting to clear the air." Both statements imply that a give and take between employees and supervisors was anticipated. Thus, I find that the meeting involved an attempt by the Respondent to elicit facts and to permit Kennedy and, perhaps, others to explain or defend their conduct. As such, it was not a run-of-the-mill shop-floor conversation of the type exempted from the *Weingarten* rule, but was, in effect, "an interview" to which the right to union representation as a condition of employee participation was applicable.<sup>9</sup> There is no evidence that the employees were informed that they had a choice of continuing the meeting without representation or not attending at all as required by *Weingarten*.<sup>10</sup>

rently on layoff from the Respondent, both with some expectation of recall, and have no personal interest in this matter. Kapla, Kemp, and Dorak are all still employed by the Respondent. Also the statement of Poss referred to above, that Kapla had done Kennedy a favor by merely warning him about his insubordination by hampering production and that he, Poss, would have written up Kennedy for it right away indicates there was a definite connection between Kennedy's role in the alleged slowdown and the meeting.

<sup>9</sup> See *AAA Equipment Service Company*, 238 NLRB 390 (1978).

<sup>10</sup> *United States Postal Service*, 241 NLRB 141 (1979).

I also find that the employees, in particular Kennedy and Kriescher, had reasonable cause to fear that discipline might result from the April 29 meeting. As noted above, both had on the previous day attended a meeting involving a similar format in which it was made clear that they were suspected of having violated the Respondent's rule concerning damaging company property. While the evidence indicates that investigatory interviews were not normally held in the lunchroom, as was this meeting, this alone was not sufficient to dispel the employees' fear that discipline might result. Safety meetings normally held in the lunchroom were announced early in the morning and held about one-half hour before quitting time. This meeting was held without any prior notice. The fact that all department employees were called to the meeting is not particularly significant because at least three, the members of the outside crew, if not all five present, were suspected of engaging in the slowdown. What is more significant is Kapla's admitted refusal to disclose the purpose of the meeting, his response to Kennedy's inquiry being, "sit down and be still." Further, his response to Kennedy's request that the union steward be present, that a steward was not needed, was not sufficient to allay the employees' fear of disciplinary action.<sup>11</sup> I do not credit the self-serving testimony of Kapla and Kemp that had evidence of rule violations been obtained at the meeting, no disciplinary action would have been taken. No such assurances were given at the meeting. The fact that Kriescher testified that he did not expect to be disciplined as a result of the meeting may well have been based on his belief that he had done nothing to warrant discipline. It does not, as the Respondent contends, cast "a significant shadow on Mr. Kennedy's claim of reasonable fear" that discipline might result.

Whether the employees' fear of possible disciplinary action resulting from the interview has a reasonable basis must be measured "by objective standards under all the circumstances of the case."<sup>12</sup> Here, there was ample reason for the employees to fear that disciplinary action might result from the meeting on April 29 and nothing said or done prior to or during the meeting could be considered to have allayed that fear.

I find that the Respondent violated Section 8(a)(1) of the Act by requiring its warehouse employees to attend the meeting on April 29 without union representation. Having found such a violation, the next question is whether Michael Kennedy, who was disciplined as a result of his conduct at the meeting, is entitled to a make-whole remedy because of the Respondent's unlawful conduct. The General Counsel argues that such a remedy is necessary since "to hold otherwise would be to allow the Employer to benefit from its illegal interview." It is further contended that had a union steward been present at the meeting he might have prevented the heated argument during which Kennedy uttered the remark which led to his discipline. Union Steward Miller testified that he had on occasion been successful in calm-

<sup>11</sup> See *Lennox Industries, Inc.*, *supra* at 608.

<sup>12</sup> *N.L.R.B. v. J. Weingarten, Inc.*, *supra* at 257, fn. 5, quoting *Quality Manufacturing Company*, 195 NLRB 197 (1972).

ing employees who got angry and abusive during the course of investigatory interviews. It is possible that he could have played such a role had he been present at the meeting on April 29.

The Board has held that a make-whole order will not be routinely granted in every case in which a *Weingarten* violation has been found.<sup>13</sup> That remedy has been limited to cases in which there has been an unlawful interview, the employee has been disciplined for conduct that was the subject of the interview, and the employer was unable to establish that its decision to discipline the employee was not based on information which it obtained during the interview. However, this does not address the question of the appropriate remedy where, as here, discipline results from the employee's conduct *during* the unlawful interview rather than conduct that was the *subject* of the interview. No cases directly on point have been found.

Having found that the heated arguments during which Kennedy called Kapla an "asshole" was a direct result of Kapla's accusation that Kennedy was involved in a work slowdown, the subject which was the principal reason for and the focus of the meeting, it follows that there was a definite nexus between the *Weingarten* violation and the conduct resulting in disciplinary action. In the cases which the Board has found a make-whole remedy inappropriate, the employers were able to establish that the disciplinary action taken was not based upon any information obtained during the unlawful interview. Thus, the disciplinary actions and the *Weingarten* violations were completely independent of one another. Here, the conduct giving rise to the disciplinary action against Kennedy arose out of and during the course of the Respondent's violation of his Section 7 rights. Consequently, I believe a make-whole remedy is appropriate and necessary in this case. This ruling does not purport to condone Kennedy's conduct at the April 29 meeting, whether provoked or not, rather, it is designed to

remedy the violation of his rights. Had a union representative been present as required under *Weingarten*, Kennedy would not be entitled to any relief under the Act. On the other hand, *Weingarten* expressly recognized that the presence and assistance of a knowledgeable representative can be beneficial to both the employee and the employer. Here, it might have prevented the abusive conduct. The Respondent, having refused to provide requested representation at an interview as required by the *Weingarten* decision, should not be permitted to discipline an employee for abusive conduct specifically arising in the course of discussions concerning the subject matter of the interview.

#### CONCLUSIONS OF LAW

1. The Respondent, Northwest Engineering Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act, by requiring Michael Kennedy and other employees to submit to an interview which they reasonably feared might result in discipline, while denying a request for union representation and by taking disciplinary action against Michael Kennedy as a result of his conduct at that interview.
4. The aforementioned unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

It having been found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

<sup>13</sup> See *Kraft Foods, Inc.*, 251 NLRB 598 (1980); *Coyne Cylinder Company*, 251 NLRB 1503 (1980).